Five Hot Topics: Issues Pending Concern in Pennsylvania's Appellate Courts

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In June, 2003, the author was honored to be asked to address
the conference of the Superior Court of Pennsylvania on a variety
of topics which have percolated to the surface of Pennsylvania ap-
pellate practice in recent years. The topics are diverse in subject
matter and each is the subject of considerable ongoing litigation.

In response to the court's invitation, brief abstracts of the five
topics were created to suggest an analytical framework for future
research in each area. These abstracts have been updated and
revised for this publication.

The areas covered are, indeed, so topical that cases published
between the time this article went to press and the reader's pe-
rusal of it must necessarily be consulted for a current appreciation
of the relevant jurisprudence.

I. GRANT-ING REVIEW OF CLAIMS OF INEFFECTIVENESS ON DIRECT
APPEAL: THE BEGINNING OF A METHODOLOGY

A. The New World of Grant

1. The Supreme Court's Treatment

As is its prerogative, the Pennsylvania Supreme Court has
charted a new path for appellate advocacy in the difficult and
challenging realm of criminal appeals. That new path has been
marked out specifically in those cases in which the performance of
prior counsel has allegedly failed to meet Constitutional standards
and, in that failure, cast doubt upon the legitimacy of the adjudi-
cation.

In Commonwealth v. Grant, the Pennsylvania Supreme Court
modified a long standing criminal appellate practice by no longer

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1. These were created with the able assistance of Professor Antkowiak's research
   assistants, Duquesne law students Julie Thiers, Matthew Debbis and Michele Babb.
2. 813 A.2d 726 (Pa. 2002).
requiring new counsel to raise claims of ineffectiveness of trial counsel on a direct appeal. As a "general rule," the court held, "a petitioner should wait to raise [such] claims . . . until collateral review." The court assured counsel for petitioners that their failure to raise such issues on direct appeal would not constitute a waiver of such claims when they subsequently pressed them in Post-Conviction Relief Act (PCRA) applications.

Grant, of course, is more than just a rule directed at defense counsel who recently entered an appearance on behalf of a client in need of a criminal appeal. It is a direction to the Pennsylvania Superior Court to dismiss virtually every such ineffectiveness claim on direct appeal in favor of its re-filing as a PCRA application with the trial court. Indeed, the Pennsylvania Supreme Court announced that its new rule would be applied to all cases then on direct appeal where the issue was properly raised and preserved.

Grant is not a constitutional rule. It is a rule based on the common sense conception that, in virtually every case in which ineffectiveness of trial counsel is raised, an appellate court is in a better position to analyze the problem where new counsel for the petitioner has had time to assess and investigate the issues, the trial court has had the opportunity to pass on the claims, and where a record beyond just the trial record itself has been generated that addresses the three legal prongs of the ineffectiveness issue.

3. Grant, 836 A.2d at 738.
5. Id. In a subsequent order in Grant, the court clarified that the new rule would not apply to any case where "the intermediate appellate court on direct appeal has rendered a disposition on the merits." See Commonwealth v. Grant, 821 A.2d 1246 (Pa. 2003) (decision without published opinion).
6. Those "prongs" were summarized in Commonwealth v. McGill, 832 A.2d 1014, 1020 n.8 (Pa. 2003), as requiring a showing that: 1) the issue has arguable merit; 2) counsel had no reasonable basis for the act or omission; and 3) prejudice to a degree calling into question the legitimacy of the outcome occurred.

The reasoning of Grant was recently applied in another appellate context: the so-called relaxed waiver rule in capital appeals. In Commonwealth v. Freeman, 827 A.2d 385 (Pa. 2003), the court, per Justice Castille, modified a longstanding practice of allowing a death row inmate to effect a direct appeal of trial court errors in the absence of the normal procedures usually required to preserve those issues for consideration on direct appeal. The court stated:
Grant brings Pennsylvania in line with federal courts and courts of many other states in requiring that such claims be deferred to a separate, later, collateral proceeding.\textsuperscript{7}

2. The Superior Court's Explication: In General

As is its duty, the Superior Court of Pennsylvania has undertaken the task of explicating this new path in a multitude of specific circumstances. As sometimes happens in that process, however, uncertainty has arisen in certain areas. The uncertainty has been manifested variously, and, in one instance is readily resolved by a narrow reading of broad language but, in a second, may require further word from those who charted this new path in the first place.

a. The Scope of Grant's Coverage: Some Pending and All Prospective Matters

Grant's effort to soothe the anxiety of new counsel by allowing them to scour the existing record only for preserved issues for the direct appeal, leaving for more reflection (and a later filing) "off-record" claims that will likely require more extended investigation, may be tempered by counsel's first reading of broadly worded \textit{dicta} in Superior Court opinions that most surely stands for a much narrower proposition.

First, the words of comfort. Grant explicitly overruled \textit{Commonwealth v. Hubbard}\textsuperscript{8} and, by necessary implication, \textit{Commonwealth v. Hubbard}\textsuperscript{8} and, by necessary implication, \textit{Commonwealth v. Hubbard}.

\begin{quote}
We hold that, as a general rule on capital direct appeals, claims that were not properly raised and preserved in the trial court are waived and unreviewable. Such claims may be pursued under the PCRA, as claims sounding in trial counsel's ineffectiveness or, if applicable, a statutory exception to the PCRA's waiver provision... Since [certain prior cases], an assumption has arisen that all waived claims are available for review in the first instance on direct appeal. The general rule shall now be they are not.
\end{quote}

\textit{Id.} at 402. The court admitted the possibility of continuing to consider a particular claim "of such primary constitutional magnitude" or one "reaching fundamental and plainly meritorious constitutional issues" regardless of whether it was otherwise "waived," but opined that such a circumstance would be rare. \textit{Id.} The \textit{Freeman} rule, unlike Grant, was established as a prospective principle only, to be effective only as to those cases in which the appellant's brief was not yet filed and was not due until after June 30, 2003. \textit{Id.} at 403.

\textsuperscript{7} Pennsylvania was cited for its efforts in this regard by the United States Supreme Court in Massaro v. United States, 123 S. Ct. 1690, 1695-96 (2003), where the Court reiterated the federal policy of directing virtually every ineffectiveness claim to actions filed under 28 U.S.C. \textsection{2255}, not direct appeal.

\textsuperscript{8} 372 A.2d 687 (Pa. 1997).
These cases had required new counsel to raise the ineffectiveness of all prior counsel at their first opportunity, and to do so by "layering" claims of ineffectiveness where that was required. Failure to raise and/or layer constituted a waiver of the issue, requiring later counsel to layer even more profoundly.

Grant viewed new appellate counsel's role quite differently. The court saw that the time frame for filing the notice of appeal was so limited that discovering ineffectiveness claims (claims "often . . . not apparent on the record") within that period was a "Herculean task" not even clearly within the duty properly imposed on appellate counsel. Moreover, even if appellate counsel performed with the rigor of a mythical god, the problems of an appellate court (seeing the alleged error in a larger context and getting the benefit of a trial court's first hand observations of that error in context) would still remain.

The clear recognition that "time is necessary for a petitioner to discover and fully develop claims related to trial counsel ineffectiveness" and that "the best avenue to effect [a petitioner's] Sixth Amendment right to counsel" is found in deferring "review of trial counsel ineffectiveness claims until collateral review," mandated that the Hubbard/Dancer rule be abandoned.

Necessary to effectuating that abandonment was the court's assurance that, in all cases affected by this new rule, ineffectiveness claims will not be considered waived unless "a petitioner has had the opportunity to raise that claim on collateral review and has failed to avail himself of that opportunity"; put another way, the court held that no waiver of ineffectiveness claims will occur simply "because new counsel on direct appeal did not raise" that claim. One adjunct of this rule would be, the court noted, that "eventually [it] will eliminate the need for layering in first PCRA petitions, since petitioners will no longer have to plead their underlying trial counsel ineffectiveness claim through the lens of appellate counsel ineffectiveness in order to avoid [waiver]."

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10. Grant, 813 A.2d at 732-33.
11. Id. at 737.
12. Id.
13. Id.
14. Id. at 737-38.
15. Grant, 813 A.2d at 738.
16. Id.
17. Id. at 739 n.16.
Given this language, broad notations in two recent Superior Court opinions seem incongruous, unless they refer to matters quite narrow to the facts before them.

In Commonwealth v. Duffy,18 and Commonwealth v. Reynolds,19 the Superior Court confronted situations in which appellate counsel raised a claim of ineffectiveness not raised in the Concise Statement required by Rule 1925(b) of the Pennsylvania Rules of Appellate Procedure. The general rule of Commonwealth v. Lord20 is that issues not raised in the Concise Statement are waived. Rather than simply relying upon Grant for the notion that ineffectiveness claims not pursued on direct appeal are not waived by that failure (and do not require layering when they are), the Superior Court, in Duffy, added the following parenthetical note:

We note that as a general rule, claims of ineffective assistance of counsel must await review under the Post Conviction Relief Act, 42 Pa.C.S.A. § 9541-9546, pursuant to Commonwealth v. Grant, 572 Pa. 48, 813 A.2d 726 (Pa. 2002). However, our Supreme Court specifically stated in Grant that its holding applies only to ‘cases on direct appeal where the issue of ineffectiveness was properly raised and presented.’ Id. at 738. Since Appellant did not properly preserve his claim of ineffective assistance of counsel, Grant does not apply. Nevertheless, nothing in our disposition prevents Appellant from alleging in a petition for post-conviction relief that counsel was ineffective for failing to properly raise and present the claim.21

The same notion is repeated in Reynolds.22 Let us contemplate first what this passage does not mean.

First, it does not mean that the only way for future appellants to assure the non-waiver of ineffectiveness claims provided by Grant once they get to PCRA is to raise them in a Rule 1925 Statement on their direct appeal. This would be directly contrary to Grant and would demand both the Herculean and superfluous task of raising ineffectiveness claims on a direct appeal in which

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21. Duffy, 832 A.2d at 1136 n.2.
22. Reynolds, 835 A.2d at 732.
they would not be heard. It would usher in a renewed “layering” requirement *Grant* held should become a thing of the past.  

Second, it does not mean that *Grant* was meant to apply only retrospectively. *Grant* pointed out that its rule, like any new, non-constitutional rule, would apply “to the case currently pending before the court and to cases prospectively,” but was also to be given some limited retroactive effect, applying to other cases on direct appeal where the issue was properly raised and preserved. As the Supreme Court would later point out in *Commonwealth v. McGill*, in cases where either the direct appeal is filed after *Grant*, that is, the purely prospective application of the rule or other cases covered by *Grant* itself (its limited retroactivity), layering ineffectiveness is not required. Only in older cases that were either on the PCRA stage or where direct appeal did resolve ineffectiveness claims at the time *Grant* was decided, would layering be needed.

Thus, the *Duffy/Reynolds* note, while phrased broadly, is a truly limited concept. In both cases, the appeals were filed before December 31, 2002, (the date upon which *Grant* was first announced) and were thus filed at a time when *Hubbard* required appellate counsel to raise ineffectiveness on direct appeal. To raise it on direct appeal, counsel had to include it in the 1925 Statement. By not doing so, the issue was not properly preserved for appellate review, making the case fall outside the literal reading of the *Grant* retroactivity clause. The *Duffy* quote, narrowly considered, is thus simply a third (and perhaps quite rare) example added to the two spoken of in *McGill* where layering is required for a PCRA application.

Even understood in this way, the results for the Duffy’s and Reynolds’ of the world is perhaps unduly harsh. Had counsel in those cases put the issue in the Concise Statement (as well as their brief), the issue would have been dismissed without prejudice to the un-layered filing of the claims in PCRA. It may be questioned whether new PCRA counsel (or, more vitally, the peti-

24. *Grant*, 813 A.2d at 738.
25. Id.
27. In this sense, *Grant* may also be seen to have modified *Lord*, since preserving an issue for subsequent review (albeit PCRA) does not require its inclusion in the Concise Statement in the intermediate step of direct appeal.
tioner himself\(^{28}\) should be placed at the disadvantageous position of layering ineffectiveness claims simply because his first appellate counsel did imperfectionally what he could not do at all, that is, raise and litigate a claim of trial counsel’s ineffectiveness for the first time in the Superior Court.

The wages of sinning in a 1925 Statement are obviously quite high, *Grant* notwithstanding.

**b. A Reluctance to Defer**

At first blush, *Grant* seeks to operate as an enhancement of the appellate system by requiring that the complex issues of counsel’s ineffectiveness be passed through the crucible of more than one level of the court system en route to a hoped-for just resolution. It seeks to let an appellate court be an appellate court, one that reviews a record for error, not generate a record in a forum generally ill-suited to that purpose.\(^{29}\)

Despite *Grant’s* seemingly clear preference for the deferral of these issues to PCRA review, the Superior Court appears eager to continue to reach these issues on direct appeal even where no specific record has been generated on the precise issue of prior counsel’s ineffectiveness or where the trial court has not specifically addressed that ineffectiveness in some post-sentence opinion. This anomaly is a more troubling manifestation of the Superior Court’s effort to explicate *Grant*, but it is best discussed in the larger context of when, and in what circumstances, direct appeal may still be the right forum for considering a claim that trial counsel was ineffective.\(^{30}\) It is to those matters that we now turn.

**B. The Long Term Implications of Grant: Are Direct Appeals Ineffectiveness Free Zones?**

*Grant* left open a fundamental question, that is, whether, and in what circumstances, Pennsylvania appellate courts should continue to entertain an ineffectiveness claim on direct appeal. The

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28. In general, for defendants, *Grant* is not a welcomed change. Under the old system, a defendant could have direct appeal counsel raise a first round of ineffectiveness claims and litigate them through the upper regions of the appeal process. Thereafter, his first PCRA with newest counsel could raise other ineffectiveness claims, under the layered ineffectiveness vehicle. Post-*Grant*, most of these “two bites” at the ineffectiveness apple situations are gone, since the one year statute of limitations for PCRA claims will likely mean that whoever raises ineffectiveness for the defendant had better be right the first time.

29. *Grant*, 813 A.2d at 733-34.

30. See infra notes 39-52 and accompanying text.
courts have already answered the question readily as to one such circumstance, with more uncertainty as to a second, and evidence a need for a methodology for a third.

1. The Easy Exception: Where PCRA Is Unavailable

PCRA petitions are moot points for defendants whose sentences are so short that they will expire before such petitions may be timely filed. Where direct appeal is the only appeal that is practically possible, the Pennsylvania Superior Court has properly recognized that all issues, including ineffectiveness of trial counsel, must be permitted.\(^3\)

Also, where direct appeal is, in essence, the only one legally possible, as in juvenile cases, the *Grant* deferral of issues will not be required.\(^3\)

2. The Seemingly Easy Exception: Where An Adequate Record and Lower Court Opinion Have Been Generated

The beneficial effects of the *Grant* deferral (time for counsel to develop issues of ineffectiveness and the presence of the trial court’s insightful consideration of those issues upon the creation of a record relevant to them) are rendered moot if, by the time of direct appeal, the issues have been developed by the creation of a relevant record and the lower court has ruled on them. Deferral in such cases becomes a pointless redundancy.

To avoid such redundancy, the Supreme Court has held that an appellate court may “review ineffectiveness claims on direct appeal for which there is an evidentiary record developing the claims and a trial court opinion addressing those claims.”\(^3\) The appellant’s use of the post-sentence motion for this purpose is the easiest way to facilitate such review.

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32. In the Interest of B.S., 831 A.2d 151, 154 (Pa. Super. Ct. 2003) (As PCRA does not apply to juveniles, and since habeas corpus relief under 42 PA. CONS. STAT. § 6501 is extraordinary and applicable only to those in detention, immediate review of ineffectiveness claims will be entertained on direct appeal of juvenile adjudication).

a. The Post-Sentence Motion

Rule 720 of the Pennsylvania Rules of Criminal Procedure allows the defendant to file a post-sentence motion that raises some or all issues he may have in support of a motion for a new trial, judgment of acquittal, or other relief. The rule and its commentary emphasize the optional nature of this motion and deem that the filing of such a motion is not necessary to preserve issues for appellate review. Indeed, the commentary advises that the defendant may choose to "raise any or all properly preserved issues in the trial court, the appellate court, or both."

Such a motion must be filed within ten days of the sentence and strict time limits are set for its disposition. The rule was enacted to streamline the process of sentencing in the trial court. It replaced a system that theretofore required a post-verdict motion in every case to preserve appellate issues and thereby lengthened significantly the time between conviction, sentence and appeal.

Today, where new counsel enters a case after verdict but before sentencing, they may opt to file the motion alleging ineffectiveness of trial counsel and seek a hearing from the trial court within the prescribed time periods. Where that is done, a full record on the ineffectiveness claim will be developed and the trial court will have its say in assessing the pertinent factors relevant to that issue. In all respects, the matter will be fully ripe for appellate review at the direct appeal stage and such issues can, should, and already have been, considered there. 34

One issue arising out of this exception is whether new counsel waives the ineffectiveness claim by not raising it in post-sentence motions. 35 Surely, such a waiver could not be implied given the Grant decision. The Commentary to Rule 720 (Miscellaneous) that may be read to imply otherwise is based explicitly upon those

34. See Commonwealth v. Bomar, 826 A.2d 831 (Pa. 2003); Commonwealth v. Todd, 820 A.2d 707 (Pa. Super. Ct. 2003); Commonwealth v. Hudson, 820 A.2d 720 (Pa. Super. Ct. 2003). It should be noted that Pennsylvania practice in this regard differs from federal practice quite substantially. In federal court, while there are provisions for post-verdict motions (See FED. R. CRIM. P. 33 (New Trial) and FED. R. CRIM. P. 34 (Arrest of Judgment)), they are seldom, if ever invoked. The reason is tactical. There is no provision in the federal law akin to PA. RULE APP. P. 1925 in which a trial court is required to set forth its reasons or to direct the Superior Court to those portions of the record that explain its rulings. Federal defendants get to appeal the cold record of the trial court's rulings and, unless they file post-verdict motions, the federal judge is never given the chance to explain or expand upon a ruling made during trial.

opinions repudiated in Grant. The strict and limited time constraints of Rule 720 would not be conducive to the type of time development the Supreme Court stated new counsel would need to necessarily assess the claims and gather the facts necessary to support them. Indeed, the whole idea of a Rule 720 motion being optional would be discarded if suddenly so complex and time-consuming a matter as a claim of ineffectiveness would have to be raised within its current parameters.

Thus, while it would seem that where an ineffectiveness claim might be raised and developed during the post-sentence period, that possibility should not be read as a necessity with the penalty of waiver hanging over the head of the litigant who chooses otherwise.  

b. The Anomaly of Some Record or Some Opinion

More troubling has been the willingness of the Superior Court to consider ineffectiveness claims where there is a partial record generated and/or when the trial court has given some of its views on the matter.

In Commonwealth v. Watson, the appellant did not file a post-sentence motion, raising his claim that counsel was ineffective for failing to correct the guilty plea colloquy only in his 1925(b) statement. The trial court addressed those claims in its 1925(a) opinion. The Superior Court, finding that the record was adequate to assess the claim (the adequacy of the factual basis for the plea) and that the trial court ruled on the matter, addressed the claim on the merits and rejected it.

In doing so, the court seemed willing to place the reviewability of the issue solely within the hands of the trial court. Rather than make its own determination of the adequacy of the record to facilitate the review, the court held:

We will review claims of ineffective assistance of counsel on direct appeal only where the trial court has addressed the claims on the merits after having determined that the existing record is sufficiently developed for resolution of the claims.

36. Indeed, finding a waiver there would do nothing but reusher in the layered claims of ineffectiveness in a PCRA filing. Such layering will be of lessening importance as Grant takes hold in the system.
38. Watson, 835 A.2d at 786.
If there is no opinion by the trial court resolving the ineffectiveness claim on the merits or if the trial court issues an opinion saying that the ineffectiveness claims cannot be addressed on the existing record because a hearing is necessary in order to develop the record we will adhere to the general rule of deferral announced in *Grant.*

There are two concerns with this approach. First, *Grant* is not a rule based on the needs of trial courts but one seeking to enhance the appellate process by insuring that it proceeds on a fully developed record. The appellate court should make that call, not the court whose judgment is being scrutinized.

Moreover, ineffectiveness claims are three pronged creatures, requiring not just a consideration of the merit of the claim but also counsel's strategic choices and the degree of prejudice counsel's failures have visited upon his client. Appellate review becomes potentially bifurcated (or trifurcated) if the truncated record below addresses only one prong of the analysis, i.e., arguable merit. If, for example, the *Watson* court disagreed with the trial court and found that there was a problem with the plea colloquy (or, as with a second issue, some arguable merit in a sentencing issue also raised), there is no indication that the "record" generated by the trial court would have addressed those points, necessitating a remand for another hearing. Such piecemeal consideration seems contrary to *Grant*’s overall thesis, and should be re-considered.

In *Commonwealth v. Wright,* the Superior Court decided an ineffectiveness claim on direct appeal without a trial court opinion on point.

To be sure, *Wright* presented an unusual scenario. Wright filed a PCRA claiming that his first counsel failed to perfect a direct appeal and raising, *inter alia,* a variety of other ineffectiveness claims. The trial court held an evidentiary hearing on all such

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39. *Id.* In his concurring opinion in *Commonwealth v. Brooks,* 839 A.2d 245, 251 n.3 (Pa. 2003), Justice Castille reminded that appellate review of these issues required not only that the lower court address them, but that the lower court generate a record adequate to meet the claim. Other cases have applied this principle. See *Commonwealth v. Mitchell,* 839 A.2d 202, 208 (Pa. 2003) (where a new judge decided post-sentence motions summarily and without a hearing after the death of the trial judge, deferral to collateral relief was required); *Commonwealth v. Crosby,* 2004 Pa. Super. LEXIS 184 (2004) (matter raised on post-sentence motion but no hearing held; as lower court did not place specific reliance on record to date, deferral to PCRA required); and *Commonwealth v. Blick,* 840 A.2d 1025, 1027 (Pa. 2004).

40. *See McGill,* 832 A.2d at 1014.

claims and took testimony from trial counsel. The trial court, having concluded that the direct appeal should be reinstated, declined to address the other issues of ineffectiveness in accord with existing precedent.42

The Superior Court, while acknowledging the seemingly clear proscription from the Grant/Bomar/Belak line to defer in the absence of a trial court opinion, forged ahead and decided that counsel’s strategy on the contested points was sound and that the claim should be dismissed, with prejudice.43 This drew a gentle, but resolute dissent from Judge Graci, who read the Supreme Court’s precedents as requiring deferral unless the trial court had ruled and the Superior Court deemed the record adequate to undertake its own evaluation.44

Finally, Commonwealth v. Causey45 produces another interesting (some might say confusing) twist. Causey claimed that his counsel was ineffective for failing to challenge the weight of the evidence and, alternative, its sufficiency. The trial court, in its 1925(a) opinion, addressed both claims and found them without arguable merit. The Superior Court found it could consider the sufficiency issue but not the weight.

The weight issue was deemed subject to the Grant deferral on the basis of Commonwealth v. Burkett.46 The Burkett court had held that under Rule 607, Pennsylvania Rules of Criminal Procedure, a motion regarding the weight of the evidence must be addressed to the trial court, or it is waived for purposes of appeal. A claim in a 1925(b) Statement that trial counsel erred in failing to make the Rule 607 motion is not cognizable on direct appeal, even if the trial court ruled on it in the 1925(a) opinion.47

The Causey court followed Burkett’s lead and declined to hear that claim.48 Causey, however, was decided before Watson, where the continued vitality of the Burkett holding was deemed subject to a re-examination in light of Belak, where the Supreme Court, according to the Watson panel, would have entertained review of a matter where some prior procedural error had occurred if the

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42. Wright, 832 A.2d at 1108.
43. Id. at 1110.
44. Id. at 1110-12.
47. Burkett, 830 A.2d at 1037 n.2-3.
overall record was adequate to its decision making process. The Causey court also readily ruled on the claim of ineffectiveness in failing to raise a sufficiency claim since the rules do not require any specific trial court motion in that regard and a 1925(a) statement can address it, at least insofar as the arguable merit prong is concerned.

In all respects, this seems to be traversing far a field from the Grant principle. Underlying Grant is the notion that ineffectiveness claims are complex matters that, by nature of their three-pronged considerations, require records distinct from the normal trial transcript and call upon both trial courts and appellate courts to contemplate issues normally unspoken on the record of the trial itself. For a court to presume to decide such an issue on less than a hearing record generated for that very purpose should demand that a court be able to say with heightened certainty that all prongs of the test may be addressed from the existing record, not just one that will superficially permit its dismissal. Such an approach seems more consistent with Grant, and perhaps the Supreme Court will once more speak to the issue soon.

3. The Most Difficult and Compelling Exception: Assessing Ineffectiveness on Just the Trial Record

The major question left open by Grant is whether there exists circumstances in which an ineffectiveness claim that has not been the subject of post-sentence motion and hearing (or, for that matter, one which is not addressed by the trial court), and which could await the PCRA stage, may nonetheless be prosecuted and fairly decided on direct appeal. As both the Grant court and the United States Supreme Court in Massaro have suggested that such circumstances may exist, various Superior Court panels have anticipated the occurrence of this phenomenon.

49. Watson, 835 A.2d at 786.
50. Causey, 833 A.2d at 175.
52. See Rosendary, 818 A.2d at 532; Commonwealth v. Ruiz, 819 A.2d 92, 96 (Pa. Super. Ct. 2003); Commonwealth v. Thornton, 822 A.2d 31, 35 (Pa. Super. Ct. 2003); Commonwealth v. Celestin, 825 A.2d 670 (Pa. Super. Ct. 2003). Judge Graci has cautioned that, to the extent such exceptions exist, the Supreme Court must recognize them and that such exceptions are not currently extant. See concurrences in Rosendary, Ruiz and Celestin. However, it may be observed that the Supreme Court's language does not explicitly reserve to itself the further contemplation of such situations. It would also be supremely ironic if, in a case where the Court put so much emphasis on a lower court's development of issues the Court would discourage such a body from reasoned analysis of pertinent exceptions.
A methodology for the discovery of such rare cases is needed. That methodology, I suggest, lies within the nature of an ineffectiveness claim itself.

a. De Facto Denial of Counsel: the Structural Defect

In the first instance, the provision of counsel to a defendant is so fundamental to the system that its absolute or de facto denial is grounds for reversal without extended analysis of particular manifestations of prejudice. In those circumstances, specified in footnote 14 of Grant to include cases of a "complete or constructive denial of counsel" or a conflict of interest leading to a breach of loyalty, the record will admit of no need for further explication. The defect there is structural. It should be as readily correctable as it is plain, and just about as rare.

Two United States Supreme Court cases illustrate the point and limit of the notion of constructive denial of counsel.

In United States v. Cronic, the Court rejected a claim that providing a defendant with a young lawyer (whose practice was principally real estate and who had only 25 days to prepare for a complex white-collar fraud trial) amounted to per se denial of counsel. The Court said such a case was unlike a true instance where, although an attorney was present, the circumstances surrounding the case made such presence superfluous. Such a case was Powell v. Alabama, the infamous Scottsboro case where counsel was little more than window dressing to the judicial sideshow that passed for a trial. In Cronic, the defendant was given the chance to assert specific instances of ineffectiveness, but the circumstance was not judged so structurally defective as to call for immediate reversal.

55. 287 U.S. 45 (1932).
56. See Cronic, 466 U.S. at 660 (discussing Powell v. Alabama, 287 U.S. 45 (1932)).
57. Id. at 673. The ultimate resolution in Cronic is a sad commentary on the system. After the Supreme Court reversal, Cronic had to re-visit the Court of Appeals to get a new trial which again resulted in his conviction in 1988. His appeal of that conviction resulted in complete vindication, with the Tenth Circuit deciding that the government's evidence was, after all, legally insufficient to sustain the charge. See United States v. Cronic, 900 F.2d 1511 (10th Cir. 1990). This vindication came 15 years after the crime was allegedly committed.
Reversal on such a basis should be rare if the system's stewardship of due process is taken seriously.\footnote{58}

\textit{b. The Egregious and Blatant Error}

The second scenario is what the United States Supreme Court identified as cases "in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal."\footnote{59} Indeed, in such a case, a court may correct the deficiency \textit{sua sponte}.\footnote{60}

To know when such a scenario is truly presented requires a court to recall what it has to decide in order to find ineffectiveness. Under the \textit{Pierce/Kimball} rule in Pennsylvania,\footnote{61} a court must find that the issue has arguable merit, that trial counsel's actions were not the result of some reasonable strategic or tactical choice, and that prejudice serious enough to call into doubt the outcome of the proceedings inured as a result. It would seem that only where the current record provides a sufficient basis for consideration of each of these three issues will the exception to the \textit{Grant} rule be authorized.

Before \textit{Grant}, the Superior Court would consider an ineffectiveness claim in a truncated manner and issue an order for a remand for an evidentiary hearing only where the issue was of arguable merit and prejudice was palpable.\footnote{62} Such a practice is not likely to survive \textit{Grant}. Rather, if the benefits of \textit{Grant} (trial court assessment and the development of issues and relevant record) are to be foregone in a given case, it must be because the current record gives dramatic demonstration that the issue is clearly of ar-

\footnotetext{58}{In rejecting an assertion that this type of denial of counsel occurred, the Superior Court in Commonwealth v. Millward, 830 A.2d 991, 995-96 (Pa. Super. Ct. 2003), held that where counsel was not absent during a critical stage of the prosecution and where counsel did put the prosecution's case "to adversarial testing," a structural error allowing review on direct appeal would not be found.}

\footnotetext{59}{See Massaro, 123 S. Ct. 1690, 1695-96.}

\footnotetext{60}{Id. Justice Castille's terminology for such an error is a claim "of primary constitutional magnitude" or "fundamental and plainly meritorious constitutional issues." \textit{Freeman}, 827 A.2d at 402. The Superior Court's opinion in \textit{Millward}, 830 A.2d at 991, does not reference this sort of error but does remind counsel that the "plain error" doctrine has been abolished in Pennsylvania. \textit{Millward}, 830 A.2d at 997.}


guable merit, that no reasonable attorney could have had a sensible strategy in mind to explain the act or omission, and that the prejudice flowing from the act/omission is both potentially case-determinative and self-evident.

In virtually every case, one or more of these factors will require further record development. Arguable merit of the claimed error may be the easiest to view without supplementary findings but tactical decisions (the absence of objections to evidence or rulings, the calling or not calling of witnesses, the making or abandoning of lines of argument, etc.) will most often require some inquiry of trial counsel before that prong of the test may be addressed. Only where no sensible explanation appears possible could a court safely abandon the deference to the procedure Grant now mandates in that context.63

As to prejudice, a trial court's assessment may well be critical since the context of any testimony admitted, excluded or not offered may be difficult to appreciate from the distance created by appellate review. Prejudice in certain cases may be plain, however, and, where it is, it works an extended injustice to the petitioner to wait upon PCRA application to correct a manifestly unjust result.

Ineffectiveness may be considered on direct appeal, then, when the record sustains its finding in each of the three prongs of the Pierce/Kimball test. That circumstance will be rare and fair doubts about its existence should lead to a default position of deferral to the collateral review process preferred by Grant. Where it exists, however, it ought to be invoked lest a defendant evidently victimized by an incompetent lawyer languish while further collateral and appellate action confirms the obvious: that he needs to be given what he has not had to date, a fair trial.64

63. The federal system, even with its plain error doctrine, admits of very few such circumstances. Where a sentencing calculation is defective due to an obvious error by counsel, ineffectiveness on direct appeal is possible. United States v. Headley, 923 F.2d 1079, 1083 (3d Cir. 1991). Mostly, however, ineffectiveness claims are deferred. United States v. Givan, 320 F.3d 452 (3d Cir. 2003).

64. By way of illustration only, suppose counsel asked for and was granted a jury instruction shifting the burden of proof to the defense to establish self-defense beyond a reasonable doubt, or casting the Commonwealth's overall burden in the case as proof to a preponderance. A sensible, non-reversible error accounting of that circumstance is impossible. To defer such an issue to PCRA is to perpetuate and extend a patent injustice, nothing more.
C. *The Dark Side of Grant: Dismissing the Frivolous Assertion*

The discussion to this point does not consider the other side of the coin: may an appellate court presented with an ineffectiveness claim on direct appeal consider it on the merits and hold that, because the asserted error is no error at all, no further consideration of the matter in PCRA ought to be allowed?

Allowing such an exception into the process without considerable constraints would undoe much of the good, systematic change *Grant* seeks to foster. *Grant* looks at the ineffectiveness claim holistically, requiring that its components be assessed in a unified, integrated way to maximize the chances that the decision on its occurrence is correct. For this reason, just as it should be the rare circumstance where a court grants relief on direct appeal without a systematic review of the issue by the lower court, so should it be rare where a court dismisses a claim as frivolous and precludes a full review in a PCRA setting.

A defendant who convinces the court to redress such an issue on direct appeal does so because the error is so "fundamental" and "plainly meritorious" that delaying consideration of it is tantamount to compounding an obvious injustice. A court that feels compelled to strike down such a claim as frivolous should feel an urgency similarly compelling. Unless the failure to strike the issue now would portend a comparable systematic disruption, the wisdom of *Grant* is to advise that deferral of the issue is the better course.\(^65\)

It is hard to imagine why the system would perceive such a need particularly when deferring the claim may simply place it into the hands of new counsel who, with the wisdom of distance from the immediate appeal, may hone the issues to those in which a colorable claim may be made. The PCRA is as inevitable as the tides in many cases, and a premature rush to stop one of the waves saves the system very little.

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65. One other formulation of this consideration comes to mind. Where federal courts are faced with habeas corpus applications, appeal by prisoners is facilitated by issuance of a Certificate of Appealability under 28 U.S.C. § 2253. In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), the Supreme Court advised that such certificates should issue unless no reasonable jurist could debate the issue. If jurists would reasonably debate it, even if all would ultimately agree that the issue failed, review should be allowed. Under *Grant*, applying such a standard would not permit the striking down of ineffectiveness claims on direct appeal unless no reasonable debate about its arguable merit could possibly be entertained.
D. Conclusion

This last discussion resonates, of course, earlier notations about the tendency of the Superior Court to decide claims of ineffectiveness on direct appeal where either no record specifically on the point has been generated or the trial court has not ruled. It was unlikely that the Supreme Court reversed a longstanding appellate practice of allowing ineffectiveness claims to be prosecuted on direct appeal only to have that practice reinstituted so readily in other forms.

Grant should be Grant. New appellate counsel should raise only those issues properly preserved on the record of the case, knowing that the PCRA stage (when it is practically and legally in play) will welcome thoughtful claims of ineffectiveness without the artificiality of the layering process. All of this should be done for the laudatory end that appellate lawyers will be more focused on the precise rendering of issues properly documented by an issuespecific record and appellate courts will be at home in the review of a trial court’s opinion addressing those matters sharpened by the adversary process.

The exception to this policy of deferral should be those rare but most troubling of cases where no reasonable judicial mind could contest the haunting sense that due process has been forsaken. In those matters, deferral is simply justice delayed.

II. THE AGGRAVATING QUESTION OF AGGRAVATED ASSAULT: WHEN SIMPLE ASSAULT IS JUST NOT ENOUGH

In recent years, a number of panels of the Superior Court have confronted the knotty problem of when a defendant’s conduct passes from that variety of assault the Legislature calls “simple” to that form it deems “aggravated”.66 The particular section of Title 18 Pa.C.S. § 2702 that has troubled the courts is § 2702(a)(1).67

66. The author has always believed that the nomenclature used in these sections is the true root of the problem. An “assault” that is “simple” seems almost benign, a mere annoyance, akin to being bumped by a boisterous fellow customer waiting with us in a check out line. The use of fists or weapons, accompanied and preceded by harsh words and vile epithets, is a circumstance that every reasonably genteel person would see as an “aggravated” one, regardless of the outcome.

In truth, of course, a “simple” assault is a serious matter. A victim suffering “impairment of physical condition or substantial pain” is the victim of more than an annoying jostling, and a defendant serving a 1-2 year sentence must realize that his offense was hardly “simple”.
The cases which have struggled with these issues are many, and a number are discussed in the majority and dissenting opinions in Commonwealth v. Gruff, a must-read opinion presenting an excellent point/counterpoint debate between Judges Lally-Green and Bender on the matter. A summary of the fact patterns and outcomes of some of these cases is set forth in the margin.

The resolution of future cases should not depend, however, upon mere reasoning by reference to prior examples. If possible, a thoughtful methodology to approach the assessment of such cases should be sought in order to guide the trial courts in their efforts to screen such cases at the preliminary and trial stages. The brief thoughts expressed here are meant to aid in searching for that methodology.

Crimes are neither intentions nor motives. They are outcomes, things deemed too disruptive of the social fabric to be ignored when they happen and so dangerous in their ultimate occurrence that we are justified in interdicting them in an inchoate stage when they are either attempted or are the object of a conspiracy.

Perhaps it is that aggravated assault penalties are so disparate and draconian when compared to simple assault that we tend to downplay the significance of the simple assault charge. There is a world of difference between the M-2 simple assault and the F-1 version of § 2702(a)(1). Still, had only the Legislature used "First Degree Assault" and "Second Degree Assault," I am reasonably sure this would have been less of a problem.

67. In short, attempting to cause serious bodily injury or actually causing such injury with malice.


69. Cases in which the evidence was found insufficient to sustain the charge include: Commonwealth v. Robinson, 817 A.2d 1153 (Pa. Super. Ct. 2002) (one, unobstructed blow struck to back of victim in aid of a robbery, not followed up by further blows and not resulting in serious bodily injury); Commonwealth v. Repko, 817 A.2d 549 (Pa. Super. Ct. 2003) (pointing gun at victim, but no evidence of intent to do more than frighten); Commonwealth v. Roche, 783 A.2d 766 (Pa. Super. Ct. 2001) (one, closed fist punch to eye causing serious bodily injury not enough to show intent necessary to sustain conviction); and Commonwealth v. Mayo, 414 A.2d 696 (Pa. Super. Ct. 1979) (scratching victim's chest with knife blade to frighten and intimidate; no serious bodily injury resulted).


70. 828 A.2d at 360. The Dailey Court called it a "case-by-case" determination. Id.
Thus, to understand a crime is to appreciate the wrongful outcome it portends.

Aggravated assault analysis must begin with an appreciation of the concept of serious bodily injury. While much of the debate in the aforementioned cases has surrounded questions of intent and "substantial step," those inquiries must always be informed by the end point of this statute: serious bodily injury. What the defendant must intend, and what the object of his substantial step must be, beyond a reasonable doubt, is something both imminent and dire.

The Legislature tells us how dire such a result must be:

'Serious bodily injury.' Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.\(^{71}\)

The Supreme Court of Pennsylvania has opined that where such injury has resulted and the charge is predicated on that form of malice manifested by criminal recklessness, the recklessness must "be such that life threatening injury is essentially certain to occur... Aggravated assault is, indeed, the functional equivalent of a murder in which, for some reason, death fails to occur."\(^{72}\)

The Superior Court has characterized the matter in a similar fashion, requiring that a defendant's act be one that "virtually assured that death or serious bodily injury" would result, and would be one that would allow the defendant to be fairly characterized as a "failed murderer."\(^{73}\)

If such a high standard of culpability is required in circumstances where serious bodily injury has actually resulted and the issue is whether the defendant's acts were sufficiently malicious to have accounted for it, it would seem only logical that a comparable level of gravitas be demonstrated where such injury has not occurred but the defendant stands accused of having attempted (intended) to bring it about.

In such a case, it would seem appropriate to assess the viability of an aggravated assault charge by asking whether the proof is sufficient to show beyond a reasonable doubt that, but for a fortui-
tous intervention, the death of the victim was virtually assured given what the defendant had done to that moment. The fortuitous interventions could either be:

- the ineptitude of the assailant;
- the assailant's decision to abandon the attack due to fear of detection;
- the gratuitous (albeit courageous) effort of a third party to deflect the attack;
- the luck of the victim;
- the dexterity of the victim in avoiding the full brunt of the assault; or,
- the prompt administration of medical attention to stave off the otherwise inevitable summoning of the coroner.  

Such a mode of analysis might provide a proper vehicle to expose whether the subject defendant fits the underlying paradigm for an aggravated assault convictee, that is, that he was a person who, having fully formed the specific intent to bring about death or dismemberment to a victim, advanced his intent by a substantial step towards that goal. If the answer to the question "why didn't the victim actually suffer serious bodily injury" is found in the fortuitous intervention alone, one may properly infer that the defendant is, indeed, the type of failed murderer that the aggravated assault statute was meant to punish.

In this regard, focusing on the substantial step alone is a dangerous process of reasoning. The same "substantial step" may support the inference of the intent to commit a wide variety of crimes. All who shoot others at some point pull out a gun and aim it in the direction of their victim, it being the province of projectiles to generally fly in the direction they are propelled. Courts are properly clear, of course, that the mere act of pulling and

74. The defendant's abandonment due to a sudden wave of conscience or, more likely, the cold chill of cowardice, would not forestall the initial determination that his attempt to cause serious bodily injury was complete. In a rare circumstance, the defendant could seek an instruction on the defense of renunciation under 18 PA. CONS. STAT. § 901(c)(1) but, in such a case, he will have already committed a number of other offenses from which that defense would not save him.

75. Unless, of course, they are "magic bullets." See The Warren Commission Report.
pointing a gun at someone does not constitute aggravated assault, as the specific intention to bring about serious bodily injury cannot be inferred from that act alone.\textsuperscript{76} Similarly, a good roundhouse punch may be the preferred opening gambit in any bar fight worth the name but the single punch is rarely, if ever, enough to give unequivocal evidence that a barrage of blows intending to end the life of the opponent is portended.\textsuperscript{77}

The point is that aiming guns and delivering a punch may be a substantial step in an aggravated assault, but the evidence of their occurrence is simply not enough to support the inference that this serious offense is the true intention of the actor, exclusive of lesser offenses that do not merit imposition of a felony-1 penalty.

It is a fundamental principle of the assessment of evidence that where the record supports the drawing of two, equally reasonable but inconsistent inferences, the fact-finder is not to be permitted to speculate that the more serious inference is proper.\textsuperscript{78} As the Court in Robinson noted, the inference of specific intent to cause serious bodily injury cannot be drawn merely from asking what could possibly have happened in the worst case scenario given the substantial step.\textsuperscript{79}

Substantial steps are helpful but sometimes inscrutable in the search for a defendant's true intent. A bigger picture must be seen. That bigger picture must show that the defendant set in motion a chain of events intending that they result in the sort of death or near death outcome serious bodily injury requires. In a case where that outcome thankfully does not occur, asking why it did not is a starting point in the effort to divine whether the defendant should be afforded long term prison housing to contemplate his regret over not having achieved the outcome he fully intended to bring about.

If it may be concluded beyond a reasonable doubt that the only reason the victim is alive (and not permanently disfigured or enduring the memory of the protracted impairment of an organ meant by nature to be unimpaired) is because of some fortuitous

\textsuperscript{76} See Repko, 817 A.2d at 549.
\textsuperscript{77} See Roche, 783 A.2d at 766; Commonwealth v. Alexander, 383 A.2d 887, 890 (Pa. 1978). The failure to properly charge the jury that specific intent must be proven when the charge is an attempt to cause serious bodily injury may be reversible error. Commonwealth v. Bracey, 831 A.2d 678 (Pa. Super. Ct. 2003).
\textsuperscript{79} Robinson, 817 A.2d at 1159.
intervention, a solid inclination to affirm an aggravated assault finding should be indulged.

III. SOMETHING WICKETT THIS WAY COMES: THE STATE OF APPEALS OF DECLARATORY JUDGMENT ACTIONS

A. A Dilemma Resolved

In recent times, a flurry of cases involving appeals from declaratory judgment actions both confounded appellate judges, and cast as characters most worthy of pity those attorneys representing clients who lost declaratory judgment actions at some stage of the Common Pleas court proceeding. Those civil litigators found themselves on the horns of a considerable and draconian dilemma, questioning whether they should file post verdict motions under Pennsylvania Rule of Civil Procedure 227.1 or file an immediate notice of appeal upon the sad occasion of the loss of their case at the trial level.

If they failed to file the motions and guessed wrong, they would find that their appeal would take a brief and humiliating course. An appellate court was apt to find that they waived all issues since none were preserved by the necessary filing.

If they filed the motions, however, they were sometimes apt to find that they should not have done so, and, when the litigation of those motions lasted for a period beyond 30 days from the date of the entry of the order they sought to challenge, they would find themselves outside the time to file a proper notice of appeal under Rule 903 of the Pennsylvania Rules of Appellate Procedure. Jurisdiction for further appeal and, with it, their client's hope for reversal, seemed to expire at midnight as the 30th day tolls.

This circumstance was almost enough to make a civil lawyer turn criminal. Blessed relief by way of clarification ultimately came in Motorists Mutual Insurance Company v. Pinkerton, a case that, sub nom, resolved a number of such appeals, including

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80. 42 PA. CONS. STAT. § 7532 et seq.
81. The author cautions the reader that he treads on thin ice in analyzing this issue since the course of his professional life has been devoted almost entirely to the practice of the criminal law where declaratory judgments are of little import. The author has always taken the position when called by a potential client for a civil case that they should lock themselves in a room with their would-be opponent and, which ever one of them emerges un-victimized then retain him for the defense of either the aggravated assault or murder charge. Thankfully, no client has taken his advice in this regard and has sought counsel more accustomed to the intricacies and superficial niceties of the civil practice.
82. 830 A.2d 958 (Pa. 2003).
State Farm Fire and Casualty Company vs. Craley.\textsuperscript{83} A summary of the cases leading to Pinkerton will help illustrate the resolution and relief it brought to the civil bar in this area.

B. The Law in Pre-Pinkerton Days

The starting point for all the turmoil was Nationwide Mutual Insurance Company v. Wickett.\textsuperscript{84} There, the Supreme Court of Pennsylvania (per Justice Nigro) ruled that a trial court improperly granted reconsideration and modification of a declaratory judgment order more than 30 days after its entry. Necessary to this determination was the court’s finding that the declaratory judgment order, (which was entered after the filing of preliminary objections) was a final order pursuant to Title 42 Pa.C.S. § 7532\textsuperscript{85} and was, by operation of Pennsylvania Rule of Appellate Procedure 341(b)(2),\textsuperscript{86} immediately appealable.

Justice Saylor dissented in Wickett, arguing that a declaratory judgment should be treated as any other form of civil action. Further, he observed that the entry of a declaratory judgment order should not be considered a proper interlocutory order any more than any other order which disposes of only part of the claims or parties in a civil action. Such an order is not deemed final in the absence of a specific lower court order that declares that an appeal of such a partial judgment is necessary in the context of that case.\textsuperscript{87}

Wickett begat the Craley opinion, before an en banc panel of the Superior Court. Writing for the majority, Judge Joyce found an appeal from a declaratory judgment order untimely where the order was entered after the filing of stipulated facts by the parties and the litigation of post trial motions by the losing side. Citing Wickett, Judge Joyce found that as long as a declaratory judgment

\textsuperscript{84}. 763 A.2d 813 (Pa. 2000).
\textsuperscript{85}. 42 PA. CONS. STAT. § 7532 states:
Courts of record, within their respective jurisdictions, shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force and effect of a final judgment or decree.
\textsuperscript{86}. PA. R. APP. P. 341 (b)(2) states that: "A final order is any order that . . . is expressly defined as a final order by statute . . . ." \textit{Id.}
\textsuperscript{87}. See PA. R. APP. P. 341(c).
order affirmatively or negatively declared the rights of the parties, it was a final order from which an immediate appeal had to be taken within the required time period, regardless of how the lower court characterized its own order. The Craley majority held:

We find no authority that restricts the application of the declaratory judgment act to cases involving preliminary objections and/or to cases involving an entry of a decree nisi . . . Similarly, we reject the suggestion and/or argument that the instant case should be exempt from the dictates of the Declaratory Judgment Act simply because it proceeded as a non-jury trial upon stipulated facts pursuant to Pa. R.C.P. 1038.1, 1038, 227.1 et seq. and Notes thereto. Nothing in the declaratory judgment act or its legislative history indicates or suggests such an exemption. A careful reading of the statute and cases interpreting the statute leads to the inescapable conclusion that regardless of whether a case involves a jury or non-jury trial, regardless of whether a case involves testimonial evidence or was submitted on stipulated facts, in a declaratory judgment action, if a trial court issues an order that affirmatively or negatively declares the rights of the parties, such a order is final and immediately appealable.

President Judge DelSole dissented in Craley, arguing that the Declaratory Judgment Act does not exempt declaratory judgments from normal rules of civil procedure and that the "normal and time honored procedural rules involving post-trial practice" should be followed in such cases, as in any other type of civil action otherwise governed by the rules.

Judge Musmanno also filed a concurring and dissenting opinion which argued that since the Craley case was submitted on stipulated facts, the parties were required to file post trial motions to preserve claims for appellate review under Rule 227.1 by operation of Rules 1038.1 and 227.1 of the Rules of Civil Procedure. The death knell for the Craley majority opinion could be heard long before the Pinkerton case was announced. About one year

88. Craley, 784 A.2d at 787.
89. Id. at 788.
90. Id. at 790 (DelSole, P.J., dissenting).
91. Id. at 794 (Musmanno, J., concurring and dissenting).
after *Craley* was decided, the Supreme Court of Pennsylvania's ruling in *Chalkey vs. Roush* intoned its forthcoming reversal.

*Chalkey* did not arise in the context of a declaratory judgment action but was a more traditional suit in equity. The Supreme Court ruled that amendments to the Rules of Civil Procedure clearly mandated that, under Rule 227.1, "a party must file post trial motions at the conclusion of a trial in any type of action in order to preserve claims that the party wishes to raise on appeal. In other words, a trial court's order at the conclusion of a trial, whether the action is one at law or in equity, simply cannot become final for purposes of an appeal until the court decides any timely post trial motions." In doing so, the court reaffirmed the position it stated in its brief but absolute ruling in *Lane Enterprises, Inc. v. Foster*, that reversed the judgment of the Superior Court and held that parties must file post-trial motions in order to preserve issues for appeal.

In a footnote, Justice Nigro addressed a concern raised by Justice Saylor's dissent that the court's *Chalkey* ruling would cause considerable confusion in the declaratory judgment area given the court's seemingly contradictory opinion in *Wickett*. Justice Nigro dismissed concerns about a confused state of law in the declaratory judgment field, opining that *Wickett* remained good law because the declaratory judgment in *Wickett* was entered as a result of a pre-trial motion. In other circumstances, particularly "where a trial court enters a declaratory order following a trial, parties must file post trial motions from that order, as they would in any other civil proceeding, before the order may be deemed a final order for purposes of an appeal."

*Chalkey* plainly conflicted with the notion in the *Craley* majority opinion that a declaratory judgment order is a final order, immediately appealable, regardless of the procedural posture in which it was entered. Posture, in this area, thus took on heightened meaning.

92. 805 A.2d 491 (Pa. 2002).
93. *Chalkey*, 805 A.2d at 496 (emphasis added).
94. 710 A.2d 54 (Pa. 1998).
95. *Chalkey*, 805 A.2d at 496 n.13. Justice Nigro particularly cited language from 42 PA. CONS. STAT. § 7539 that deems that a declaratory judgment action which relies upon the determination of an issue of fact “may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions. . .” *Id.*
C. The Three Postures

1. After jury/non-jury trial

After Chalkey, a party to a case wherein a declaratory judgment was entered after a jury or a non-jury trial, had to invoke the procedures of Rule 227.1 before proceeding on an appeal. The Superior Court later adopted that reasoning in the Liberty case.96

2. After pre-trial motions

Where the declaratory judgment is entered pre-trial on the basis of preliminary objections or a summary judgment motion, Chalkey seemed to leave Wickett undisturbed. Counsel in such a case were well advised to file immediate notice of appeal. This procedure was ratified by the Superior Court in the Cresswell case.97

Generally, a decision on a declaratory judgment action rendered at preliminary objection or summary judgment stage would not, as in other cases, require the filing of some "post-trial" motions prior to appeal. The Advisory Committee note to Rule 227.1 states that motions for post-trial relief may not be filed for orders disposing of preliminary objections, motions for judgment on the pleadings or motions for summary judgment.98

The question of whether such an order is immediately appealable or is, as Justice Saylor would evidently argue, an interlocutory order not immediately appealable under Title 42 Pa. C.S. § 7320, remained another matter. If it was treated as any other claim or order entered as to one or more but fewer than all of the claims and parties in a case, it could be argued that Rule 341(c) of the Pennsylvania Rules of Appellate Procedure would deem it an immediately appealable order only if the lower court certified that an immediate appeal of it "would facilitate resolution of the entire case." A strict reading of Wickett and Craley would make that separate determination by the trial court superfluous and deem the order immediately appealable and final. That issue remained anticipating further resolution by the Supreme Court.

3. After stipulated facts

The third circumstance in which a declaratory judgment action may be potentially ripe for an immediate appeal is where the decision comes after a stipulation of facts by the parties. The Superior Court in *In re: Trust of Ware*, 99 decided that a matter involving a stipulation of facts was to be treated in the same manner as a pre-trial motion, that is, immediately appealable upon the entry of declaratory relief without the necessity of filing exceptions under Rule 227.1.

However, as some of the dissenters in *Craley* have pointed out, Rule 1038.1 of the Civil Rules appears to work in conjunction with Rule 227.1 and require that where a trial court has concluded a matter on the basis of the filing of stipulated facts, its “procedure as far as practicable shall be in accordance with the rules governing a trial without jury” which, after *Chalkey*, requires the filing of post-verdict motions. Confusion here, too, remained.

D. The Pinkerton Solution

The *Pinkerton* majority opinion was penned by Justice Nigro. In simple terms, the court declared that *Craley* was wrongly decided and that declaratory judgment actions that proceed to final resolution by jury trial, non-jury trial or by stipulated facts (deemed the equivalent of a non-jury disposition pursuant to the Comment to Rule 1038.1) cannot be appealed until post-trial motions under Rule 227.1 have been filed and resolved. 100 *Wickett* was confined to cases involving pre-trial orders under 42 Pa.C.S. § 7532; otherwise, an extension of *Wickett* would “undermine the uniform procedures that this Court has devised with respect to post-trial proceedings.” 101 Such an extension would “unnecessarily complicate application of [Rule 227.1] and result in further confusion among litigants and the lower courts.”102 To end that confusion, the majority held that post-trial declaratory judgment orders would be treated just like post-trial orders in any other matter, by requiring post-trial motions to fulfill the “venerable purpose” of

100. *Pinkerton*, 830 A.2d at 964.
101. *Id.*
102. *Id.*
letting a lower court correct its own mistakes before an appellate court had to do so.\textsuperscript{103}

E. An Observation in Closing

The result of \textit{Pinkerton} is no surprise. While it is clear that Title 42 Pa.C.S. \textsection 7532 states that a declaratory judgment has the force and effect of a final judgment and decree, it is difficult to argue with Justice Saylor's observation in his dissenting opinion in \textit{Wickett} that this language was meant to insure that courts realized that a declaratory judgment was an adjudication of a controversy, and not simply an advisory opinion outside the normal province of judicial action; it did not, in his view, create "a separate and unique scheme for the appeal of otherwise interlocutory orders in declaratory judgment proceedings."\textsuperscript{104}

To be sure, the statute did not, by its terms, deem a declaratory judgment to be \textit{immediately appealable}; it deemed it a final judgment or decree. As Judge DelSole pointed out in his dissenting opinion\textsuperscript{105} in \textit{Craley}, matters involving procedure are delegated by the Pennsylvania Constitution to the judiciary and procedures requiring steps for the entry of a final judgment should not be abrogated by a statute that, at least, did not speak clearly to such an abrogation.\textsuperscript{106} Requiring that a party file post-trial motions in declaratory judgment act would not mean that the judgment was any less final; it would simply imbue the process with an additional layer of scrutiny before readying it for delivery to an appellate court.

\textsuperscript{103} Id. The Superior Court has declined to apply \textit{Pinkerton} retroactively and to quash an appeal where post-verdict motions were not filed, citing the pending confusion in this area prior to the \textit{Pinkerton} court's pronouncement. Liggett v. Nat'l Union Fire Ins., 2004 Pa. Super. LEXIS 163 (2004).

\textsuperscript{104} \textit{Wickett}, 763 A.2d at 819 (Saylor, J., dissenting). In \textit{Pinkerton}, Justice Saylor noted one anomaly in the majority's reasoning that may yet be revisited in later considerations of the Declaratory Judgment Act based on this same notion. The \textit{Pinkerton} majority did not disturb \textit{Wickett's} reading of the words of the Act to make a certain bit of procedural magic in rendering a pre-trial order in a declaratory judgment case immediately appealable, despite the normal qualifications on such pre-trial orders in Rule 341. \textit{Pinkerton}, 830 A.2d at 965. Justice Saylor advocated that \textit{Wickett's} construction of the Act be revisited, presumably to remove all remnants of that magical quality, regardless of the procedural rule that might be affected. \textit{Id.} Again here, the logic of that revisiting is compelling.

\textsuperscript{105} Judge DelSole's view in this matter could be characterized as the position that while a declaratory judgment is a final order, \textsection 7532 does not say \textit{when} it is final order.

\textsuperscript{106} This point was also made many years ago in the Superior Court opinion in Hertz v. Hertz, 448 A.2d 626 (Pa. Super. Ct. 1982), where the court noted that the "substance of a final judgment . . . is a matter of procedural distinction" within the province of the Supreme Court's rulemaking power. \textit{Hertz}, 448 A.2d at 627.
The tendency of the law in many areas recently has been to require greater preparation of a case by a trial court for appellate review. Indeed, *Pinkerton* forms part of a larger view of appellate practice manifested in other areas outside the narrow confines of declaratory judgments.

Our discussion *infra* of the *Grant* opinion is a clear example, as is the Supreme Court’s recent change in the relaxed waiver rule in capital cases in *Freeman*. The premise of *Grant* is that matters involving allegations of ineffective assistance of trial counsel in a criminal case are best funneled to collateral proceedings which begin in the trial court, require the trial court to generate a proper record addressing those issues, and mandate that the trial court address the various legal standards so that the appellate court may review a complete and ripe record of these often difficult issues.

In criminal cases generally, while the post-verdict proceedings have been streamlined in order to accelerate the sentence, and while post-sentence motions are deemed optional, the courts have insisted on the procedures set forth in Pennsylvania Rule of Appellate Procedure 1925(a) that direct a judge who entered the order appealed from to file of record a statement in the form of an opinion setting forth the reasons for the order or, at least, specifying the place in the record where those reasons could be found. This is all in aid of proper review by the Superior Court so that the initial process of an appeal is not a scavenger hunt through a bulky record to unearth the issues that should otherwise be made plain.

It thus seemed to do little mischief to the importance or efficacy of a declaratory judgment to require the objecting party to address their specific concerns to the trial court so that those objections might be organized, summarized and thoughtfully rendered before the matter proceeds to the Superior Court for its review. Certainly, it would have been profoundly incongruous in a world of rules that demand careful preparation of a matter for appellate review that counsel who invoked those rules to ask the lower court to clarify and expand its record in aid of a better appeal would find that their laudatory request would render the appeal they sought to perfect fatally out of time.
IV. SPEEDBUMP ON THE ROAD TO PERDITION: GLEASON AND THE NECESSITY OF PROBABLE CAUSE IN TRAFFIC STOPS

Equal to America's love of the automobile itself is the law's fascination with the justification for the stopping of those beloved vehicles (and their often less than lovable drivers) by members of the law enforcement community.

In 2001, the Pennsylvania Supreme Court proclaimed that an expansive view of the justification for stops of vehicles that had crept into Pennsylvania jurisprudence was to be aborted. 107

Perhaps inspired by the reasonable suspicion-type stops permitted of pedestrians under the Terry v. Ohio 108 doctrine, 109 courts had permitted police to stop vehicles upon suspicion that some vehicular offense was being committed, but without probable cause to sustain that view. Such a view was also undoubtedly reinforced by the Legislature's use of the creative but ultimately imprecise phrase "articulable and reasonable grounds to suspect a violation of [the Motor Vehicle Code]" in defining when a stop was authorized.

A. Gleason

Commonwealth v. Gleason 111 spoke with directness and clarity in ending this trend. Citing to its prior opinion in Commonwealth v. Whitmyer, 112 the Supreme Court reminded that the stop of a vehicle was a seizure, requiring the full protections of the Constitutional Amendments that then apply. 113 The court evidently felt that the brief stopping of a pedestrian to ask a few questions was a markedly distinct level of intrusion from an automobile stop on a highway and that, accordingly, probable cause (and nothing less) would suffice to justify it.

The court interpreted the Legislature's language to equate with probable cause, holding that the divergence in terminology was a distinction without a true difference. 114

110. 75 PA. CONS. STAT. § 6308(b).
111. 785 A.2d 983 (Pa. 2001).
112. 668 A.2d 1113 (Pa. 1995).
113. Gleason, 785 A.2d at 987.
114. Id. at 988. Presumably, the Legislature's amendment of this statutory language on Sept. 30, 2003: "(b) authority of police officer. — Whenever a police officer is engaged in a
As the Superior noted recently, *Gleason* settled the issue of whether reasonable suspicion short of probable cause could ever justify a traffic stop; the prior cases that suggested it could were, post-*Gleason*, effectively "discredited."\(^{1}\)

**B. Gleason Interpreted**

The *Gleason* declaration has not, however, settled all accounts in this area. By review of cases in and around *Gleason*, it appears that courts will still struggle with these issues, albeit in a different context.

An example of this struggle is provided by *Commonwealth v. Slonaker*.\(^{16}\) The majority in *Slonaker* held, as follows:

We conclude that Appellant's continuous weaving over a five mile stretch of road, coupled with his acceleration and deceleration, suffice to justify Trooper Marasco's *suspicion* that Appellant *may have been intoxicated* and we find that he had *probable cause* to stop Appellant's vehicle.\(^{17}\) [emphasis added]\(^{18}\)

Suspicion that something may have occurred is not normally probable cause to justify a police seizure. The passage quoted above does not reveal if the court was finding probable cause to arrest for DUI or some other Motor Vehicle Code offense.

**C. A Method to Gleason's Saneness**

The author suggests that faithfulness to the *Gleason* doctrine requires that a reviewing court assess whether probable cause to support a stop was present by asking a more precise question in each case.

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\(^{1}\) Systematic program of checking vehicles or drivers or has a reasonable suspicion that a violation of this title is occurring or has occurred, he may stop a vehicle . . . " 75 PA. CONS. STAT. ANN. § 6308(b) was neither meant to nor will it have any impact on the constitutionally-based rule of *Gleason*. *Id.*


\(^{18}\) See also *Commonwealth v. Mickley*, 2004 Pa. Super. LEXIS 305 (2004). The author has always been bemused by the fact that appellate courts often name the officer in traffic stop cases, for reasons not quite clear. Homicide detectives seldom get attribution in murder cases, but the brave souls who patrol the highways of the Commonwealth are often immortalized in opinions concerning their on scene actions.
Probable cause is not a generic sense of discomfort in an officer that the cosmic peace of his municipality may be in a state of disruption. Probable cause, like the lesser reasonable suspicion and the greater proof beyond a reasonable doubt, is a standard of proof of a crime, a point on a continuum the endpoint of which is that the defendant is guilty of a specific infraction for which criminal penalties may be assessed.

Probable cause is thus offense specific and, accordingly, the true question is what offense did the officer have probable cause to believe the driver was committing when he stopped him?

Judge Brosky was certainly correct in his concurrence in Commonwealth v. Roudybush that Whitmyer requires that the officer be able to articulate probable cause to believe all elements of an offense are being committed before he seizes the vehicle and its driver. The officer in Terry v. Ohio could act upon his reasonable suspicion of an attempted burglary, but an officer in Pennsylvania pulling someone over needs to have probable cause as to each element of the relevant traffic offense before his form of seizure is justified.

This does not, of course, mean proof beyond a reasonable doubt, as the court properly recognized in Commonwealth v. Vincett. The officer in Vincett saw a driver traveling the wrong way on a street the officer knew to be one way. The defendant claimed that the street was inadequately marked as one way and that this should provide him with a defense. The court agreed that it might, but such a defense would not defeat the probable cause the officer had to stop him in the first place.

It is hard for the author to imagine a case where an officer would, by observing the movement of the vehicle alone, have probable cause to stop strictly for DUI. Certainly, whether the blood alcohol level of a driver exceeded .10% is something no officer
could tell by observing the car movements alone unless he had a second job as a comic book superhero.

Moreover, whether the person was rendered incapable of safe driving by alcohol is also something “erratic” driving alone would not reveal. Judge Brosky’s concurrence in Roudybush is instructive in this regard as well, pointing out that erratic driving by itself is no crime in Pennsylvania and that something more must be shown to make out offenses for which such a stop would be justified.123

For the DUI, it is well to remember that field sobriety tests, coupled with observations of the unholy trinity of indicia124 are most commonly used to supplement the observations of Code violations to elevate a case to arrest status for DUI. Neither field sobriety tests nor observations of odor, speech and glassy eyes can be made from a moving vehicle and, logically, observations of the vehicle’s operation alone are virtually always insufficient to justify probable cause for a stop on this complex offense.

The police need not have probable cause to believe a DUI is afoot, however, before they stop the car. Probable cause for lesser offenses, like driving within a single lane,125 reckless driving,126 and careless driving,127 all lend themselves to a proper vehicle stop when something patently obvious like breaking the speed limit or running a stop sign has not occurred.

As the courts have noted, however, these offenses are not satisfied just by proof of some form of erratic operation by the driver. The “something more” in these cases is evidence that the conduct presents a safety hazard under existing conditions. The Gleason Court itself recognized this need when the stop was purportedly under § 3309,128 and the reckless and careless driving statutes each require “disregard for the safety of persons or property.” Short of showing that the driving presented a true hazard under the conditions, the driver should proceed on his way even if his driving would make his high school driver’s education instructor chagrined.

123. See Battaglia, 802 A.2d at 657. The Supreme Court’s summary reversal of Commonwealth v. Baumgardner, No. 1297 MDA 2000, reversed, 796 A.2d 965 (Pa. 2002), is also dramatic evidence of this point as Baumgardner embraced erratic driving as a proper basis for a stop.
124. See supra note 12.
125. 75 PA. CONS. STAT. § 3309.
126. 75 PA. CONS. STAT. § 3736.
127. 75 PA. CONS. STAT. § 3714.
128. Gleason, 785 A.2d at 989.
That an officer suspects that the bad driving is not the result of poor technique but has its roots in alcoholic excess is not enough to justify the stop.

There is a bizarre way to look at this. "Safe driving" is not to be equated with "excellent driving." Strictly speaking, "safe driving" is simply driving within the confines of the Motor Vehicle Code. To be "incapable of safe driving" a person would necessarily be driving outside of that Code. Where all the officer knows is that someone is actually operating a vehicle, and no Code violations have occurred, it is hard to argue that probable cause exists to find them incapable of the conduct they are presently evidencing.

Until they cross the line of the law (and not just the fog line of an otherwise deserted highway), the Gleason rule advises the officer to keep watch, but effect no seizure.129

V. ORDERING DISORDERLY CONDUCT: POINTS FOR CONSIDERATION

To understand 18 Pa.C.S. § 5503, Disorderly Conduct, one must understand what the watchful eye of the law is aimed at preventing and prohibiting by this statute.

It is a statute that is often used as a "default" charge to cover a wide range of otherwise non-descript criminal conduct and, as all who have labored in the vineyards of practice before magisterial courts know, it is a favored disposition when a more serious

129. Such a rule also reminds the police that stops of motor vehicles are not whimsical peradventures to be undertaken merely as an excuse to pursue what may have been the true motive for the stop. This is illustrated by Commonwealth v. Lana, 832 A.2d 527 (Pa. Super. Ct. 2003).

In Lana, the Commonwealth contended that at 4 a.m. on June 13, 2002, a Philadelphia policeman saw Lana's black Jaguar with New York plates parked on a residential street "in an area of Philadelphia known for its high incidence of crime and drug use." Id. The officer then observed Lana drive car for one block at 5-10 miles per hour in a 20 mile per hour zone. Without more precise criminological studies, it would be difficult to intuit that the driver of an out of town, high-end luxury sedan, operated in a seedy neighborhood, at less than full horsepower capacity, at a time long after the bars had closed, would present evidence meeting the quintessence of probable cause for a DUI stop. Such, however, was the officer's stated conclusion, and it lead him to stop the car, purely out of concern that its driver was incapable of safe driving. To, perhaps, the surprise of no one, the stop did not mature into a traffic citation but instead became a narcotics interdiction. This occurred, according to the officer, when Lana, once emerging from his vehicle, so inartfully produced his driver's license that "a clear Baggie fell from [his] pocket [that was] later ascertained to contain crack cocaine." Id.

The Superior Court did not share the officer's intuition about the need for the stop. The court found the stop and subsequent "dropsy" seizure unlawful. There was no specific mention in the opinion about the possibility that the stop was pre-textual. Perhaps that was a matter best left to those who embrace res ipsa loquitur as the marvelous thing it is.
charge, although applicable, requires more process than the case seems to merit.

There are times, however, when disorderly conduct is the lead allegation and discerning when it truly applies requires a consideration of a surprising number of elements for what seems like so simple a charge.

A. At Its Essence

The Pennsylvania Supreme Court advises that the “cardinal feature of the crime of disorderly conduct is public unruliness which can or does lead to tumult or disorder.” It is an offense that “embraces activity which disturbs the peace and dignity of a community.” Further, one may only be properly charged if the actions and circumstances are the “type of spark the statute so plainly seeks to extinguish before it becomes a flame.”

It is unlikely, of course, that a court would find much guidance if told to look for a “spark” that “embraces” something when it is trying to decide if the evidence in a given situation is sufficient. For such guidance, a consideration of the elements of this crime is needed. This piece seeks to help organize that thoughtful consideration.

B. The Constitutional Dimension

The elements of the offense are critical to parse out in this area because disorderly conduct is a statute that walks a fine Constitutional line separating valid exercises of expressive conduct from behavior legitimately deemed criminal. The Supreme Court of Pennsylvania has cautioned that this statute cannot be used to invade the province of protected free speech rights. “[T]he disorderly conduct statute may not be used to punish anyone exercising a protected First Amendment right.” The Mastrangelo court reminded that before any conduct could be assessed under the elements of this statute, it would first have to be determined that the statute, as applied, carefully avoided criminalizing conduct protected under the Constitutions.

131. Greene, 189 A.2d at 725.
To pass Constitutional muster, the statute must be interpreted to reach only those areas where a Constitutional statute may go. In this context, there are generally three areas that this statute could reach within Constitutional boundaries. The first is "unprotected speech."

To draw the line of protected speech, the Pennsylvania Supreme Court borrowed from the United States Supreme Court's holding in *Chaplinsky v. New Hampshire*:

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. ‘Resort to epithets or personal abuse in not in any proper sense communication or information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.‘

A second, closely related type of conduct the statute could reach is that which would fit the clear and present danger test. Not merely applicable in matters of national security, the test of *Brandenburg v. Ohio* allows prosecution of words directed at producing or inciting imminent lawless action (i.e. an immediate violent response) when given in a context making it likely that such an unlawful result will occur. This is like, but is more than, the "fighting words" described in the quote above.

A third context in which such a statute could operate is a punishment of speech that violates a valid time, place and manner restriction. There, a state may, by a content neutral regulation

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that is narrowly tailored to serve a significant government interest and which leaves open reasonable, alternative channels of speech, limit the time, place and manner of the speech.\textsuperscript{136} If the statute is interpreted to differentiate among speech based on its message, or unreasonably restricts the ability of the speaker to convey his message particularly in traditionally public forums, it exceeds Constitutional boundaries.

The first task of a court in assessing the applicability of the statute is, thus, to insure that the "speech" involved is either unprotected (by its nature or because it fits the narrow clear and present danger exception), or whether the state seeks to apply the statute not because of what is said but simply the time of day, the place or the volume in which it is said.

Having performed this threshold review, a court must then ponder whether each of the elements of the statute has been met. Those elements often reinforce many of the Constitutional precepts that make up the initial consideration; they are, however, independently important as this statute does not punish all unprotected speech. In fact, it punishes only a discreet portion thereof.

\textbf{C. The Three Elements}

Although this may seem very "elementary," and is not discussed in any of the cases in this piece explicitly, the first element to every crime or offense is an act. An act, as defined in the Crimes Code of Pennsylvania is "a bodily movement whether voluntary or involuntary."\textsuperscript{137} A defendant's bad disposition may be the source of his undoing, but it is only when he acts on that disposition that he proceeds towards disorderly conduct.

The second element is intent. "The \textit{mens rea} [intent] requirement of this statute demands proof that appellant by his actions intentionally or recklessly created a risk or caused public inconvenience, annoyance or alarm."\textsuperscript{138} One cannot be "disorderly" negligently, and it is not enough that one hopes that, by their actions, others will become disorderly; the defendant's own actions must be done with the intent to cause the sort of outcome the statute prohibits.\textsuperscript{139}

\textsuperscript{137} 18 PA. CONS. STAT. § 103.
\textsuperscript{139} \textit{Id.}
Further, the intent of the actor is important regarding the grading of the offense. If the actor intends "to cause substantial harm or serious inconvenience, or if he persists in disorderly conduct after reasonable warning or request to desist"\textsuperscript{140} it is an offense in the third degree.\textsuperscript{141} Otherwise, the crime is a summary offense.\textsuperscript{142}

The third element is that the actor’s conduct occur in a public place. "Public" means "affecting or likely to affect persons in a place to which the public or a substantial group has access . . . ."\textsuperscript{143} Courts consider the location of an occurrence and the defendant's knowledge of his surroundings as a basis for the determination of whether or not the actions were in a public place.\textsuperscript{144}

The court in \textit{Commonwealth v. Smith}\textsuperscript{145} confronted a circumstance in which the defendant directed a physical assault towards another bar patron whose characterizations of the defendant were construed as overly critical. In this case, the appellant argued that the evidence was insufficient to convict him of the misdemeanor grade disorderly conduct because "there was nothing presented to prove that his actions were directed at anyone except the victim."\textsuperscript{146} The court in \textit{Smith} stated that it was "constrained to agree"\textsuperscript{147} because the trial court improperly relied on a case involving a summary offense which upheld a prosecution of "one who engages in disorderly behavior in a public place . . . even if that

\textsuperscript{140} 18 PA. CONS. STAT. § 5503(b).
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} 18 PA. CONS. STAT. § 5503(c).
\textsuperscript{144} See \textit{Commonwealth v. Coon}, 695 A.2d 794, 798 (Pa. Super. Ct. 1997), where the court held that when a property is located in a rural community, in far distances from any public road (250 feet) or other residence (700 feet), even though it may affect an adjoining residence, this does not fit the definition of public.

The Superior Court recently distinguished \textit{Coon} in \textit{Commonwealth v. Troy}, 832 A.2d 1089 (Pa. Super. Ct. 2003). In \textit{Troy}, a disgruntled neighbor sent a landlord a bag of garbage wrapped in Christmas paper. This festive offering was intended to be offensive only in the confines of the landlord’s fashionable home, but, by delivering it through the "public" medium of the Post Office, the defendant ran afoul (no pun intended) of the statute by creating a physically hazardous and offensive condition in that arena. \textit{Troy}, 832 A.2d at 1093. The court also found that the defendant did so recklessly, in that while she intended the message only for the private displeasure of the recipients, her mailing of it was in conscious disregard of the exposure to postal workers in the more public forum of their workplace. \textit{Id.} at 1094.

The author cannot help but note the \textit{Troy} court’s partial delineation of the contents of the Christmas package as consisting of “a used sanitary napkin, hairballs, rotten oranges, banana peels” and other garbage. \textit{Id.} at 1091. Not quite as terrifying as a receiving a two year old fruitcake, but disgusting nonetheless.

\textsuperscript{146} \textit{Smith}, 811 A.2d at 580.
\textsuperscript{147} Id.
behavior is directed toward a single individual." While reckless conduct would be sufficient to sustain the summary offense version, the misdemeanor of the third degree version "of the offense . . . requires a showing of specific intent to cause substantial harm to the public or serious public inconvenience." As the intent of Smith was confined to his victim-to-be alone, the intent to cause a greater, public disruption was not shown.

The three elements common to all disorderly conduct charges are, thus, an offensive act, a mens rea either categorized as intentional or reckless, and the causing or risking of public disruption. As the statute has potential ambiguity, lenity requires that it be narrowly construed to attain its lawful goal.

Like any criminal statute, the lawful goal of this statute is the prevention of a feared outcome. The true gravamen of this statute is the suppression of public annoyance, inconvenience or alarm, or, more precisely, that form of annoyance, inconvenience and alarm that mandate that the word "unjustified" be its preceding adjective. Rap music at any level may be annoying to a neighbor whose passion is Bach. Public "annoyance," however, must be seen as a disruption of the lawful uses to which the public space invaded was intended, just as "inconvenience" must imply a disruption of the sort that normally only a physical obstruction may cause. "Alarm" must be of the "fire in a crowded theatre" type or the panic attendant to an incipient riot, not just the alarm those in power might feel when their ideas or political power bases are threatened. The elements of the statute must always be read with this central goal in mind.

Coupled with these three elements must then be one of the four specified behaviors that complete them. The behaviors give further narrowing and definition to the offense.

D. The Four Behaviors

The first specified behavior is "engages in fighting or threatening, or in violent or tumultuous behavior." This is an enumeration that, in a shorthand sort of way, subsumes the prior discussion of unprotected speech and/or speech that presents a clear and

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148. Id.
149. Id.
150. 18 PA. CONS. STAT. § 5503(a)(1).
present danger. The words and conduct here may not be seen in the abstract; the context of the words/acts is all important. When considering this and “in determining whether words constitute fighting words, the circumstances surrounding the words can be crucial, for only against the background of surrounding events can a judgment be made whether [the] words had a direct tendency to cause acts of violence by [others].”

The second specified behavior is “makes unreasonable noise.” It is here that courts must be very careful to ferret out whether the charge has been filed merely because of the decibel level of the words or because the content of the message was unsettling to the official ears regardless of the volume at which they were uttered. If “a protected first amendment right to free speech is implicated, it is necessary that the actor intend to breach the public peace by making unreasonable noise.”

Unreasonable noise is something that must be viewed (or, heard, to be precise) in context. An actor may be intending to do no more than convey his political views in a proper public forum. City council meetings all over the Commonwealth would lose their entertainment value completely if a decibel level restriction were imposed. So, for that matter, would sports events. In other contexts, that same decibel level may well be unreasonable. It is the context, not the content, of the message and its volume that matters.

What is unreasonable noise? Pennsylvania law defines unreasonable noise as “not fitting or proper in respect to the conventional standards of organized society or a legally constituted community.” In some, if not all instances, the assessment is based on whether or not the noise is “inconsistent with neighborhood tolerance or standards.” Therefore, one must look at the location, whether or not it is in a rural, urban, or suburban setting and further, neighborhood to neighborhood in some situations even within the same community.

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153. 18 PA. CONS. STAT. § 5503(a)(2).


156. Gilbert, 674 A.2d at 287.
The third behavior is one almost impossible to prove: "uses obscene language, or makes an obscene gesture."\textsuperscript{157} To answer whether or not something is obscene, the Constitution requires reference to the test set forth in \textit{Miller v. California}.\textsuperscript{158} To be obscene, the court must inquire, "(a) whether "the average person, applying contemporary community standards" would find the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."\textsuperscript{159} Once again here, as it was regarding unreasonable noise, the matter is based on "the average person, applying contemporary community standards."\textsuperscript{160}

No case known to the author has found a word or gesture "obscene" in this context.\textsuperscript{161} Colorful language hurled at another in anger seldom is meant to, or does, appeal to their prurient interest. Moreover, in a world of cable television, prurient appeals are now, some might say tragically, high art.

The fourth and final specification within the statute is "creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor."\textsuperscript{162} To be a hazardous condition, "the accepted meaning is that which involves "danger or risk."\textsuperscript{163} Further, an actor or his actions are not protected if they do not serve any legitimate purpose. A legitimate purpose is "conduct which is lawful and constitutionally protected."\textsuperscript{164} This is perhaps the vaguest aspect of this statute and, for that reason, should be interpreted strictly. Stupid, childish pranks may, by any definition, be offensive,\textsuperscript{165} but whether they create a "hazardous" or "physically offensive" condition, should be another matter.

\begin{footnotes}
\item[157.] 18 PA. CONS. STAT. § 5503(a)(3).
\item[158.] 413 U.S. 15 (1973).
\item[160.] \textit{See id.}
\item[161.] \textit{Kelly}, 758 A.2d at 1286; Commonwealth v. Bryner, 652 A.2d 909 (Pa. Super. Ct. 1995); and \textit{Hock}, 696 A.2d at 228 (similar words found not to be fighting words).
\item[162.] 18 PA. CONS. STAT. § 5503(a)(4).
\item[164.] Roth, 531 A.2d at 1137.
\end{footnotes}
E. Conclusion

The four behaviors are not stand-alone acts. They are the specific ways in which the Legislature prohibited people from acting either recklessly or with the intent to cause public annoyance, inconvenience or alarm. Only if all elements are shown with respect to non-protected speech activity may a conviction be upheld.

This statute was meant to enforce some measure of civilization and civility in an unruly world. It was not meant, however, to strip the world of colorful characters and their antics. The First Amendment protects Howard Stern in the same way it protected Fred Rogers. Disorderly conduct should never be used as a sword against any viewpoint, or those we merely despise, or find horribly annoying.